IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEREMIAH G. HUTT,	§	
	§	No. 71, 2012
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE,	§	ID No. 1105002043
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: July 9, 2012
Decided: August 15, 2012

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 15th day of August 2012, it appears to the Court that:

(1) Defendant-Below/Appellant Jeremiah Hutt appeals from his Superior Court conviction and sentence for Possession with Intent to Deliver Marijuana, Possession of Marijuana Within 1000 Feet of a School, and Possession of Drug Paraphernalia. Hutt contends that the Superior Court's failure to charge the jury *sua sponte* as to the included offense of Possession of Marijuana deprived Hutt of a fair trial. We find no merit to Hutt's argument, and affirm.

(2) Detective Michael Gifford of the Wilmington Police Department was conducting camera surveillance of the area of 10th and Pine Streets while

investigating a murder. Detective Gifford saw a man, later identified as Hutt, conduct what Detective Gifford believed to be multiple hand-to-hand drug exchanges. Detective Gifford requested that a patrol car be sent out to detain Hutt. Officer Michael Coleman responded. He asked Hutt whether he had anything illegal in his possession, and Hutt admitted that he "had a little bit of weed." Officer Coleman confirmed this and took Hutt into custody. A search of Hutt's person at the station revealed a plastic bag containing several small bags of marijuana, and another plastic bag containing a similar set of small empty bags.

(3) Hutt was arrested five days later and charged by indictment with Possession with Intent to Deliver Marijuana, Possession of Marijuana Within 1000 Feet of a School, and Possession of Drug Paraphernalia. At trial, Detective Gifford testified that he believed Hutt had been selling marijuana because of the activities he observed, the packaging of marijuana into $5 bags, and the lack of paraphernalia for smoking the marijuana. The surveillance footage was admitted into evidence. Hutt testified on his own behalf. He admitted to possessing marijuana when he was taken into custody, but stated that he did not sell marijuana and did not intend to sell it.

(4) The jury convicted Hutt of all charges. He was sentenced to thirteen years of Level V incarceration, suspended after seven years for decreasing levels of supervision. This appeal followed.

(5) We review a claim that Superior Court improperly failed to issue *sua sponte* a lesser-included offense jury instruction for plain error where that claim was not raised below.[1] To show plain error, the defendant must show that "the failure to grant that instruction would have affected the outcome of his trial."[2] "[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[3]

(6) It is undisputed that Hutt did not request, and the Superior Court did not issue *sua sponte* a lesser-included offense instruction for Possession of Marijuana. Hutt contends that this oversight constituted plain error because it was a fundamental oversight by all parties that deprived him of his right to a fair trial. Hunt also contends that the error rendered the jury unable to perform its duty.

(7) Delaware has adopted the "party autonomy" approach for jury instructions on lesser-included offenses.[4] Pursuant to this approach, the Superior

[1] *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006).
[2] *Id*.
[3] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (internal citations omitted).
[4] *State v. Cox*, 851 A.2d 1269, 1274 (Del. 2003) (citing *Chao v. State*, 604 A.2d 1351, 1358 (Del. 1992), *overruled on other grounds by Williams v. State*, 818 A.2d 906 (Del. 2002)).

Court is not required to issue a lesser-included offense instruction *sua sponte*.[5] As we stated in *Brower*:

> In Delaware, . . . the trial judge does not consider whether there is a rational basis in the evidence to instruct the jury on a lesser-included offense "unless requested to do so by a party." Under this "party autonomy" approach, the burden is initially on the parties, rather than the trial judge, to determine whether an instruction on a lesser-included offense should be considered as an option for the jury. *The trial judge should not give an instruction on an uncharged lesser offense if neither side requests such an instruction because to do so would "interfere with the trial strategies of the parties*."[6]

Hutt argues that the party autonomy approach does not foreclose a claim for plain error in cases where there is no conceivable trial strategy for failing to request the lesser-included offense instruction.

(8) There is no basis to find plain error here. This Court has declined previously to find plain error for failure to issue instructions *sua sponte*, on the sole basis that defense counsel had the responsibility to request them and did not do so.[7] Although our case law has not foreclosed the possibility of plain error review in these circumstances,[8] Hutt has not shown that such review is appropriate here.

---

[5] *See State v. Brower*, 971 A.2d 102, 109–10 (Del. 2009) (holding that trial court erred by granting defendant new trial based on court's conclusion that it should have issued lesser-included offense instruction *sua sponte)*; *Chao*, 604 A.2d at 1358 (holding that burden of requesting lesser-included offense instruction is properly placed with defense counsel, not court).
[6] *Id.* at 107 (emphasis added) (citations omitted) (quoting *Cox*, 851 A.2d at 1272–73).
[7] *See Younger v. State*, 2009 WL 2612520, at *4 (Del. Aug. 26, 2009).
[8] *See Johnson v. State*, 2007 WL 1238887, at *3 (Del. Apr. 25, 2007) (refusing to find plain error where defendant did not request lesser-included offense instruction and offered no argument that

Hutt's trial counsel had the opportunity to review the jury instructions and was aware of the facts supporting a lesser-included offense of Possession of Marijuana. To the extent that Hutt is arguing that trial counsel's oversight deprived him of his right to a fair trial, that claim is more properly addressed as ineffective assistance of counsel claim. As we explained in *Chao*, holding otherwise would force the trial court to scrutinize the record *sua sponte* for any conceivable lesser include offense instruction that may be appropriate.[9] We decline to place such a burden on the trial court.

(9) Moreover, Hutt has not met the high burden of showing that the failure to grant a lesser-included offense instruction for Possession of Marijuana would have affected the outcome of his trial.[10] The jury also convicted Hutt of Possession of Marijuana Within 1000 Feet of a School, and Possession of Drug Paraphernalia. The drug paraphernalia charge alleged in the indictment stated that Hutt "did possess with intent to use plastic bags as drug paraphernalia to pack a controlled substance." A conviction for that charge is fully consistent with a conviction for Possession with Intent to Deliver. Both of these convictions were supported by Detective Gifford's testimony. Even if there was a rational basis in

---

failure was not strategic decision by counsel); *Perkins v. State*, 920 A.2d 391, 399 (Del. 2007) (citing *Keyser*, 893 A.2d at 960).

[9] *Chao*, 604 A.2d at 1357–58.

[10] *See Keyser*, 893 A.2d at 959.

the evidence for the Possession of Marijuana instruction, Hutt has not demonstrated that failure to issue that instruction would have affected the outcome of his trial.

(10) There is no basis for this Court to find plain error based on the Superior Court's failure to issue a Possession of Marijuana instruction *sua sponte*. Nor did the absence of the instruction leave the jury unable to perform its duty in returning a verdict. Here, Hutt has not alleged any error in the instructions as to the offenses charged, and as explained above, the Superior Court was under no duty to provide the jury with instructions for lesser-included offenses.

(11) NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED.**

BY THE COURT:

/s/ Henry duPont Ridgely
Justice